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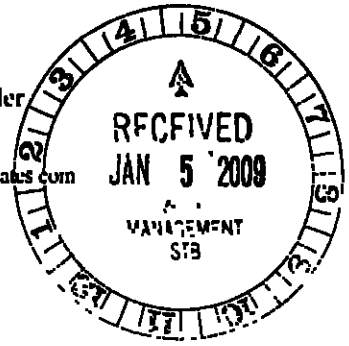

January 5, 2009

Hand Delivery

224290

Ms. Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

Re: Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company, Finance Docket No. 35087

Dear Ms. Quinlan:

Enclosed for filing in the above-referenced matter are the original and ten (10) copies of the **Petition for Stay of the Village of Barrington, Illinois.** Please note that this petition includes a request for expedited treatment. I also enclose a check in the amount of $200.00 for the filing fee.

Please time and date stamp the additional copy of this letter and the Petition, and return them with our courier. Thank you for your assistance. Please do not hesitate to contact me if you have any questions.

Sincerely,

Brendon P. Fowler

Brendon P. Fowler

Counsel for the Village of Barrington, Illinois

Enclosures

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35087

224290

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION
– CONTROL –
EJ & E WEST COMPANY

PETITION FOR STAY OF THE VILLAGE OF BARRINGTON, ILLINOIS

EXPEDITED TREATMENT REQUESTED

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**ATTORNEYS FOR
THE VILLAGE OF BARRINGTON,
ILLINOIS**

Dated: January 5, 2009

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SURFACE TRANSPORTATION BOARD

Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION
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PETITION FOR STAY OF THE VILLAGE OF BARRINGTON, ILLINOIS

The Village of Barrington, Illinois ("Barrington"), hereby submits its petition to stay the effective date of Decision No. 16 in the above-captioned proceeding[1] ("Decision") pending judicial review and compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA").[2] Barrington respectfully submits that the environmental review conducted in this case is fundamentally flawed and fails to comply with NEPA in numerous material ways. Therefore, Barrington is likely to succeed on its petition for review. Barrington submits that it and all of the surrounding townships and municipalities that rely on Barrington for essential services,[3] as well as many other communities on the approximately 198-mile EJ&E line will be irreparably harmed if a stay pending review is not granted; that neither Canadian National Railway, Grand Trunk Corporation (collectively "CN" or "Applicants") nor anyone else will be

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1 The "Decision" refers herein to *Canadian Nat'l Ry Co and Grand Trunk Corp – Control – EJ&E West Co*, STB Finance Docket No 35087 (hereinafter "Docket No 35087"), Decision No 16

2 Barrington filed its Petition for Review with the United States Court of Appeals for the District of Columbia Circuit simultaneously with the instant Petition for Stay While the Petition for Review and related briefs may raise arguments addressing defects in the Board's decision in addition to those presented here, Barrington respectfully submits that the defects presented in this Petition for Stay are alone sufficient to demonstrate the likelihood that Barrington will prevail in its assertion that the Board failed to comply with NEPA.

3 This includes Villages of Barrington, Barrington Hills, Deer Park, Lake Barrington, North Barrington, South Barrington and Tower Lakes, and Barrington and Cuba Townships

harmed if a stay is granted pending judicial review; and that a stay pending review is in the public interest.

Barrington is likely to succeed on the merits because of numerous fundamental flaws in the NEPA process. *First*, the Surface Transportation Board ("STB" or "Board") failed to consider all reasonable alternatives to the proposed action because it improperly adopted without scrutiny Applicants' stated purposes for the transaction as the Purpose and Need for the environmental review. This error led the Board into an unduly constricted alternatives analysis. A proper alternatives analysis is at the "heart" of any proper environmental review. If the Board had scrutinized Applicants' stated purpose for the transaction and framed the Purpose and Need for the environmental review properly, the Board would have had more alternatives worthy of analysis and the environmental review may have taken a very different direction [4]

Second, NEPA requires that the Board undertake a reasoned analysis of the environmental benefits and harms of the proposed action and its alternatives as well as its environmental consequences. This obligation is essential to making an informed decision regarding the proposed action in light of the environmental consequences. Here, the Board merely *assumed* many of the supposed environmental benefits, when it had a NEPA obligation to evaluate and quantify the alleged environmental benefits. For example:

- With respect to noise, "SEA did not perform this analysis on the CN segments...;"[5]
- SEA "did not examine the extent to which the Proposed Action would relieve rail congestion in the Chicago metropolitan area, nationally or internationally;"[6]

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[4] *See infra* Part I A.1, at 8

[5] DEIS, at 4 10-14

[6] *Id* at 3 4-73

How can the Board reasonably claim, as it did in dozens of instances in the Decision and the adopted environmental record, that the proposed action will benefit communities inside the EJ&E arc if it did not analyze rail congestion and noise impacts inside the EJ&E arc? Next, the Board *weighed* those assumed but undocumented benefits against the documented harms that are likely to result from the proposed action. Absent record evidence of documented benefits, it is not *possible* for the Board to have rationally concluded, or for the public to have had a meaningful chance to consider, what decision should have been made. If the Board had been in a position to weigh proven benefits against proven harms, the public would have been aware of the impact of the proposed action and the Board's decision may have been different.[7]

Third, the Board failed to evaluate all of the reasonably foreseeable environmental consequences of the proposed action, which NEPA requires.[8] For example, the Board found that the proposed action would put the EJ&E Line at full capacity, but did not consider the environmental impacts of the logical and reasonable possibility that CN would choose to double-track more or all of the EJ&E Line. Similarly, having recognized the reduction in CN traffic on routes it operates in Chicago inside the EJ&E arc would create capacity, it was unreasonable for the Board to fail to consider whether (i) the other numerous railroads operating on those same routes in Chicago would take the opportunity to change their routings on current traffic to take advantage of the created capacity or that (ii) within a very short time CN or other railroads operating on the same routes as CN within Chicago would change their routings to use additional capacity. Had it considered the environmental consequences of the logical, reasonable, and foreseeable probability of this increased capacity (and thus the temporary and soon dissipated

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[7] *See infra* Part I A.1. at 15

[8] *See infra* Part I A 1. at 19

nature of any purported environmental benefits along the CN routes in Chicago), its environmental analysis, and ultimately its decision may well have differed.

All of the foregoing material errors cut across the entire Draft Environmental Impact Statement[9] ("DEIS") and Final Environmental Impact Statement[10] ("FEIS") and fundamentally undermine the environmental analysis of the proposed action. These defects are in the "DNA" of the decision and therefore ruin every environmental conclusion in the Decision, and necessarily mean the Decision fails to meet the requirements of NEPA.

Fourth, the Board failed to properly consider and respond to numerous reasoned comments, including comments from the U.S. Environmental Protection Agency ("EPA") and the U S Department of Interior ("DOI") on critical noise impacts, EPA and Barrington comments on air emissions, and Barrington comments on regional and local highway system and emergency response impacts.[11]

This is not a case where Applicants should be permitted to irretrievably consummate their proposed transaction while a court reviews the environmental aspects of the Board's Decision Were Applicants to do so, and the court determine that the NEPA process was not followed, any alternative to achieve the purpose and need of the project would be forever foreclosed. Barrington, towns around Barrington and many other towns along the EJ&E Line would be irreparably harmed if the Board does not stay its Decision. The environment itself will be irreparably harmed if the Board does not stay its Decision CN would not be harmed by a stay, because a stay would not trigger any termination rights under the Stock Purchase Agreement

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[9] Draft Environmental Impact Statement for the Proposed Canadian Nat'l Ry. Co. Acquisition of EJ&E Ry Co., STB ID No 39185, Finance Docket No 35087 ("DEIS").

[10] Final Environmental Impact Statement for the Proposed Canadian Nat'l Ry Co Acquisition of EJ&E Ry Co., STB ID No 39515, Finance Docket No. 35087 ("FEIS")

[11] *See infra* Part I A 4, at 28

("SPA").[12] Moreover, CN has fully functioning routes through Chicago today and could continue to use them during the appeal and any reconsideration on remand. The interest of the public favors a stay.[13]

REQUEST FOR EXPEDITED CONSIDERATION

Barrington respectfully requests expedited consideration of this stay petition. Expedited consideration is appropriate and necessary in light of the Decision's January 23, 2009 effective date, the operation of which fully triggers the numerous irreparable harms flowing from the Board's NEPA violations. Barrington has concurrently filed a petition for review of the Decision with the United States Court of Appeals for the District of Columbia Circuit. In the event of a denial of this stay petition or delay of a Board decision, Barrington will seek a stay from the Court. In either event, in order to permit sufficient time to seek a stay from the Court, Barrington respectfully requests that the Board render its decision on this petition for stay by **January 12, 2009.**

BACKGROUND

In its Decision, the Board granted CN's application to acquire control of the EJ&E West Company, a wholly owned non-railroad subsidiary of the Elgin, Joliet & Eastern Railway Company.[14] By law, the Decision could not proceed unless and until an appropriate review and analysis was conducted under NEPA, which was purportedly completed with the issuance of the

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[12] "SPA" refers herein to Docket No. 35087, Railroad Control Application, Exh. 2 (Stock Purchase Agreement). None of the arguable ambiguities in Sections 2.3 or 9.1 of the SPA related to a stay apply to alter the rights of the parties (whatever they are) after December 31, 2008.

[13] *See infra* Part I.A.5, at 38.

[14] Decision at 2. EJ&E West Company will own substantially all of the current rail lines of the Elgin, Joliet & Eastern Railway Company and, after the transaction is consummated, change its name to match that of its former parent. Accordingly, EJ&E West Company is referred to herein as the "EJ&E" and the rail line to be acquired is referred to as the "EJ&E Line."

FEIS on December 5, 2008. As a condition of its approval, the Board imposed environmental mitigation conditions.[15] Applicants will shift much of the rail traffic currently moving over CN's routes in Chicago to the EJ&E Line.[16] Applicants expect the transaction to reduce the number of trains that would otherwise need to travel into Chicago, and expect reduced freight rail congestion and potential environmental benefits in communities where CN traffic is routed today.[17]

The Decision summarizes Applicant's purposes as follows:

> Purposes Served. Applicants state three primary purposes for pursuing the control transaction. First, they believe the control transaction would improve their operations in and beyond the Chicago area by providing CN with a continuous rail route around Chicago, under applicants' ownership, that would connect the five CN lines that presently radiate from Chicago Second, acquiring EJ&E's rail assets would make available to applicants EJ&E's Kirk Yard—an automated classification facility in Gary—as well as smaller facilities in Joliet and Whiting, IN, thus enabling applicants to consolidate car classification work at Kirk and East Joliet Yards and to reduce use of the BRC Clearing Yard. Lastly, applicants state that their system would benefit from the fact that EJ&E provides an important supply line for North American steel, chemical, and petrochemical industries, as well as for Chicago-area utilities and others, which would allow applicants to develop closer and more extensive relationships with companies in and serving those industries.[18]

The Decision summarizes the Board alternatives analysis as follows:

> Alternatives Analyzed. Three alternatives were evaluated during the environmental review process the proposed action; the no action alternative (under which SEA assessed rail operations that would take place on the EJ&E line if applicants did not acquire

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[15] *Id.* at 3

[16] As discussed *infra*, SEA only addressed the number of CN trains remaining on CN's five rail lines following this shift of traffic to the EJ&E Line This underestimated the amount of traffic that will remain on the CN routes through Chicago because it ignored all non-CN trains

[17] *Id* at 5

[18] *Id* at 9-10

> control of that line); and the proposed action with conditions, including environmental mitigation measures. As the courts have repeatedly found, under NEPA, the Board need only consider "reasonable, feasible alternatives," and the Board agrees with the Final EIS that these were the reasonable and feasible alternatives in this case Alternatives that do not advance the purpose of the proposal before the agency are not considered reasonable or appropriate. SEA therefore properly eliminated four other proposed alternatives from detailed study in the EIS because they did not meet applicants' stated purposes and need for the transaction.[19]

With few exceptions set forth in the Decision, the Board adopted all of the analysis and conclusions of the Board's Section of Environmental Analysis ("SEA").[20] The Board concluded that the DEIS issued for public review and comment, and the FEIS, together took the requisite "hard look" at the potential environmental impacts associated with the transaction. The Board agreed with SEA's analysis of alternatives and found that SEA's final recommended environmental mitigation (as modified in the Decision) was reasonable and feasible to address the environmental effects of the transaction.[21]

Barrington serves as the commercial hub for the area, and has a significant local economy. Barrington and the surrounding area have a population in excess of 30,000, and the surrounding area has significant tracts of open green space, managed parks, and wetlands. The EJ&E Line, which has historically had very little freight traffic, traverses Barrington directly through its center.[22] The EJ&E Line also crosses four critical roads and the Metra train line at

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[19] *Id.* at 36-37 (citations omitted)

[20] For this reason, the conclusions of SEA in the DEIS and FEIS are sometimes referred to herein as conclusions of the Board

[21] Decision at 38

[22] *See, e g* , FEIS, Appendix E, Comment 15601 (hereinafter "Barrington's Comments on DEIS") at 1-2 Although the FEIS suggests that historic train volumes on the length of the EJ&E Line averaged between 10 and 20 trains a day, the FEIS's data does not cover every year and there is no indication that the line segment through Barrington reached those levels FEIS, Appendix A, 394-395

grade in a span of 5,918 feet inside Barrington's village limits The EJ&E Line also crosses a fifth heavily-traveled road, Cuba Road, just east of the village limits, which sees average daily traffic of 8,300.[23] In addition, the surrounding communities also rely on Barrington for essential services such as the high school, the two middle schools, the Catholic grade school, the public library, numerous social service agencies, and a diverse array of emergency response services. Significantly, the headquarters for Barrington's fire/EMS and police response is located at the Public Safety Facility on U.S. Route 14, less than one-quarter of a mile from the EJ&E crossing. Barrington's local geography and roadways, as well as the close proximity to the EJ&E Line of numerous schools, hospitals, residences, and facilities for emergency responders means that a single freight train could shut down four major thoroughfares simultaneously and block the Metra/Union Pacific ("UP") line.[24] Consequently, the numerous environmental and socioeconomic harms flowing from the proposed action will be immediate, substantial, and irreparable.[25]

ARGUMENT

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest.[26] As further discussed below, Barrington

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[23] 2004 U S Department of Transportation Crossing Inventory Information.

[24] Blockage of the Metra/UP line would halt UP freight trains, which in turn could trigger further roadway blockages in and around Barrington *See* Barrington's Comments on DEIS, at 36-40

[25] *See, e g* , The Village of Barrington's Comments to the Draft Scope of Study (filed February 15, 2008), at 2-3

[26] *See, e g* , *Illinois Cent R R Co – Constr and Operation Exemption – In East Baton Rouge Parish, LA*, STB Finance Docket No 33877 (served February 20, 2002) (*citing Virginia Petroleum Jobbers Ass'n v FPC*, 259 F.2d 921 (D C Cir 1958), *Wash Metro. Area Transit Comm'n v Holiday Tours, Inc* , 559 F 2d 841 (D C Cir 1977)) The party seeking the stay carries the burden of persuasion on all the elements required for a stay. *Id*

meets the requisite stay standards, and the Board should stay its decision in light of the numerous harms flowing from its violations of NEPA.

I. Barrington Is Likely To Prevail On The Merits

Barrington will succeed on the merits of its claim that the Board failed to follow NEPA prior to rendering its decision if it can demonstrate that the Decision is either "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[27] An agency action is arbitrary and capricious if, for example, the agency has failed to follow procedure as required by law,[28] or has entirely failed to consider an important aspect of the problem.[29] As the D.C. Circuit quoted approvingly in *Holiday Tours*, it is not necessary for the petitioner to demonstrate an absolute measure of the probability of success on the merits, but rather a sufficient showing is one that raises "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation."[30] As further discussed below, numerous serious issues surround the Board's arbitrary and capricious adoption of SEA's flawed FEIS, and the Board's numerous violations of NEPA provide a firm basis for Barrington's significant likelihood of success on the merits.

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[27] *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 11 (D.D.C. 1998) (*citing* the Administrative Procedure Act, 5 U.S.C. § 706(2))

[28] *See* 5 U.S.C. § 706(2) (2007)

[29] *Clark*, 27 F. Supp. 2d at 11 (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))

[30] *Holiday Tours*, 559 F.2d at 844 (*quoting Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953))

A. The Board Violated NEPA By Failing To Analyze All Feasible And Reasonable Alternatives

Without any independent scrutiny or analysis, the Board adopted the Applicants' stated purposes of the proposed action as the Board's statement of purpose and need for the alternatives analysis. This wholesale adoption was improper under NEPA, caused the Board to conduct an unreasonably narrow alternatives analysis, which rendered the environmental review process an empty formality, and made the Board's decision on the proposed action a foreordained result.[31]

1. NEPA Compels The Board To Define The Purpose And Need Of The Proposed Action

Alternatives analysis is the "heart of the environmental impact statement."[32] However, alternatives analysis is based on the defined purpose and need of the proposed action, making the purpose and need definition a vital precursor. Thus, in an environmental impact statement, the preparing agency must "specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[33] The agency itself, rather than the project proponent, "bears the responsibility for defining at the outset the objectives of an action."[34] The determination of the underlying purpose and need of a proposed action is a critical threshold issue, because it bears directly on the agency's duty to discuss alternatives to the proposed action

An agency "may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power

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[31] Given the Board's incredibly narrow Purpose and Need definition and the resulting limits on alternatives, it is no wonder that so many communities felt compelled to reach settlement agreements with CN

[32] 40 C F R § 1502.14 (2008)

[33] *Id* at § 1502.13

[34] *Citizens Against Burlington v Busey*, 938 F 2d 190, 195-196 (D C Cir 1991)

would accomplish the goals of the agency's action, and the EIS would become a foreordained formality."[35] The rationale for refusing to condone an agency's impermissible narrowing of the purpose and need is clear: the "'purpose' of a project is a slippery concept ... [o]ne obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)."[36]

If an agency "constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy [NEPA]."[37] An agency argument that it is forced to accept the definition of "purpose and need" provided by the proponent of the proposed action is a "losing position."[38] An "agency cannot restrict its analysis to those 'alternative means by which a particular applicant can reach *his* goals.'"[39] The agency has "the duty under NEPA to exercise a *degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.*"[40] In short, "[i]f NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives."[41]

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[35] *Id.* at 196.

[36] *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002) (*quoting Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997)).

[37] *Simmons*, 120 F.3d at 666.

[38] *Id.* at 666, 669.

[39] *Id.* at 669 (emphasis in original).

[40] *Id.* (internal quotation marks omitted) (emphasis added).

[41] *Id.* at 670.

2. The Board Violated NEPA By Adopting CN's Stated Purpose And Need Without Scrutiny

The Board adopted Applicants' stated purposes for the proposed action without any independent analysis or scrutiny. The Board's adoption of Applicants' purpose is directly from the DEIS/FEIS,[42] which in turn is directly from CN's Application.[43] SEA almost literally "cut and pasted" CN's purpose and need statement and made it the starting point for alternatives analysis in the DEIS.[44] This was arbitrary and capricious and a violation of NEPA. *See Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) (evaluation of "alternatives" mandated by NEPA *is to be an evaluation of alternative means to accomplish the general goal of an action; it* is not an evaluation of the alternative means by which a particular applicant can reach his goals.); *see also Atchison, Topeka & Santa Fe Ry Co. v. Callaway*, 382 F. Supp. 610, 623 (D.D.C. 1974) (actual primary purpose of project was not to replace lock and dam structure, but to expand facility's capacity to meet expected increases in waterway traffic, and agency violated NEPA when EIS failed to adequately consider feasible alternatives under expanded purpose).

Every assertion made in the Purpose and Need section of the DEIS is explicitly and exclusively premised upon assertions of Applicants SEA gives no scrutiny to the purpose and need statements of CN and after commenters objected to this in comments on the DEIS, SEA wrote in the FEIS that "CN is responsible for preparing the Purpose and Need for the project."[45] There is no indication anywhere in the DEIS or the FEIS that SEA engaged in *any* independent review of the purpose and need of the proposed action. This abject failure to engage in any

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[42] *See, e g*, Decision, at 9-10.

[43] Application, at 22

[44] *See, e g*, DEIS, at 1-8 to 1-9

[45] FEIS, at 3 4-59.

critical inquiry into the self-serving purpose and need advanced by Applicants is arbitrary and capricious and a clear violation of NEPA.

Had the Board engaged in even a basic inquiry, it would have described the purpose and need more broadly. Applicants need improved fluidity in and through Chicago. They already have a continuous route – in fact, more than one – and do not necessarily need a "new" route. If Applicants need a new route, they do not necessarily need to route *all* through traffic onto the new route. They do not need to *own* the line to use it effectively or to make capital investments. Applicants do not need Kirk Yard, East Joliet Yard and Whiting Yard *per se*; they need yard capacity, perhaps centralized, perhaps not. Other yards, perhaps with expansion or capital improvements, could provide additional capacity. Applicants could classify some traffic outside of Chicago; they could use the yards they already have; or they could do some classification outside Chicago, some in their existing yards, and some in Kirk, East Joliet, or Whiting yards. Applicants do not need to own the EJ&E Line to obtain access to key industries. Railroads routinely enjoy commercial access without ownership, through reciprocal switching, trackage rights, or marketing arrangements The point is not that the Board would necessarily have analyzed all of these examples or only these examples; the point is that the Board did not analyze *any* of them because the Board artificially constrained the Purpose and Need.

3. The Board Foreclosed Analysis Of Reasonable And Feasible Alternatives And Failed To Address An Appropriate Range Of Alternatives

The blind acceptance of CN's purposes for the transaction inevitably led to the Board's decision to evaluate only the proposed action, the proposed action with conditions and the no

action alternative and the failure to develop and analyze an appropriate range of reasonable alternatives.[46] The Board summarized its alternatives analysis as follows.

> As the courts have repeatedly found, under NEPA, the Board need only consider 'reasonable, feasible alternatives' and the Board agrees with the Final EIS that [the three alternatives] were the reasonable and feasible alternatives in this case. Alternatives that do not advance the purpose of the proposal before the agency are not considered reasonable or appropriate. SEA therefore properly eliminated for other proposed alternatives from detailed study in the EIS because they did not meet *applicants' stated* purposes and need for the transaction.[47]

Based solely on Applicants' purpose and need definition, the Board rejected numerous alternatives that (as presented or with modifications) would be viable alternatives if the Board had reasonably defined the purposes and needs of the transaction. For example, despite requests by numerous commenters during both the scoping and DEIS comment phases, SEA failed to analyze any variations of existing or expanded trackage rights as an alternative because of SEA's assertion that expanded trackage rights fail to "meet the .. purpose of and need for the Proposed Action."[48] In fact, the only rationale SEA provided for the rejection was that *CN* claimed expanded trackage rights would not give it an incentive to invest in the line, control over the Kirk Yard, or "ensure coordinated operations over both CN and EJ&E rail lines to maximize overall efficiency in the interest of customers using both railroads."[49]

Another alternative the Board rejected because of its unreasonably narrow purpose and need definition was the Chicago Region Environmental and Transportation Efficiency Program

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[46] DEIS, at 2-40

[47] Decision at 36-37 (footnotes omitted, emphasis added)

[48] DEIS, at 2-65; *see also* FEIS, at 3.4-90 ("Expanded trackage rights is one alternative that was considered but not fully analyzed because it would not meet all three components of the Applicants' Purpose and Need ")

[49] DEIS, at 2-65, *see also* FEIS, at 3.4-90

("CREATE").[50] CREATE is a public-private partnership designed to implement "critically needed improvements to increase the efficiency of the region's rail infrastructure and the quality of life of Chicago-area residents."[51] Members of the CREATE program include not only CN, but the other five Class I railroads (BNSF Railway, Canadian Pacific Railway, CSX Transportation, Norfolk Southern Railway, and UP), as well as the Chicago commuter rail agency Metra, the Illinois Department of Transportation, and the Chicago Department of Transportation.[52] The intent of CREATE is to "restructure, modernize, and expand the freight and passenger rail facilities and highway grade separations in the Chicago metropolitan area while reducing the environmental and social effects of rail operations on the general public."[53] CREATE involves the development of five rail corridors in Chicago, and 78 other projects related to Chicago's rail infrastructure.[54] Despite the obvious relevance of the CREATE program, and numerous scoping and DEIS comments on the viability of many aspects of CREATE as an alternative to the proposed action,[55] the Board gave short shrift to CREATE. Following a cursory review of CREATE's purposes and development, the Board simply asserted that CREATE would only partially satisfy the first element of CN's stated purpose and need, and would not satisfy the other two.[56]

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[50] *See* http://www.createprogram.org/

[51] DEIS, at 2-65

[52] *Id.* (internal quotation marks omitted)

[53] *Id.*

[54] *Id.* at 2-66

[55] *See, e.g.*, Barrington's Comments on DEIS, at 26-28; FEIS, at 3.4-73

[56] DEIS, at 2-66 to 2-68, *see also* FEIS, at 3.4-74

What is particularly troubling is that the Board acknowledged that some of the rejected alternatives *did* meet part of CN's narrowly defined purpose and need, but rejected them anyway. Under NEPA, an agency is required to consider and analyze alternatives that, while individually unable to meet the purpose and need of the project, might meet the purpose and need if considered *cumulatively*.[57] In *Davis, supra*, the court held that the agency failed to adequately consider alternatives that were "rejected ... because, standing alone, they would not meet the purpose and need of the Project" but "no effort was made to consider [those alternatives] . *together* and/or in conjunction with alternative road expansion as a means of meeting Project goals."[58] Here, the Board rejected alternatives without analysis because they *individually* did not meet all three elements of the narrow purpose and need.[59] The Board acknowledged that several eliminated alternatives met at least some elements of that narrow purpose and need.[60] In other words, even if the Board's unquestioning adoption of Applicants' purpose and need were somehow defensible, the Board's subsequent refusal to analyze numerous alternatives that met at

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[57] *Davis*, 302 F.3d at 1121-22 (agency's failure to consider transportation management system, mass transit, and road expansion alternatives cumulatively rather than individually was "egregious")

[58] *Id* at 1121 (emphasis in original).

[59] *See, e.g.*, FEIS at 3 4-90 ("Expanded trackage rights is one alternative that was considered but not fully analyzed because it would not meet *all three components* of the Applicants' Purpose and Need "), *id* at 3 4-92 ("As stated in Section 2 5 of the DEIS, alternatives that would not meet these *three primary purposes* are not reasonable and feasible") (emphasis added)

[60] *See, e g , id* at 3 4-88 (responding to comments with assertion that alternate means to acquire Kirk Yard or serve EJ&E Line customers would still not meet CN's need to improve its operations around Chicago); *id* at 3 4-89 ("*Although some of the alternatives suggested by commenters could meet some of CN's purposes*, they would not meet all three and thus were eliminated from detailed analysis ") (emphasis added), *id* at 3 4-93 ("As stated in Section 2 5 of the DEIS, alternatives that would not meet these three primary purposes are not reasonable and feasible *Although some of the alternatives suggested by commenters could meet some of CN's purposes*, none would meet all three and, thus, they are not reasonable and feasible ") (emphasis added)

least some of that narrowed purpose and need, and may have met all of it if taken cumulatively, is not [61]

The ultimate result of the Board's flawed approach to alternatives was a substantive review of only three alternatives: (1) the No Action alternative, (2) the Proposed Action, and (3) the Proposed Action with minor and largely "voluntary" mitigation measures. Courts routinely condemn agencies that fail to engage in a meaningful discussion of a true range of alternatives.[62] Here, the Board's litany of missteps – (1) the whole cloth adoption of the proponent's self-serving purpose and need, (2) the cursory review and rejection of various admitted alternatives solely on the grounds that they do not precisely meet that rigid purpose and need, including those that did meet some portions of that purpose and need, and (3) the ultimate review of only the No Action, Proposed Action, and Proposed Action with minor mitigation variations – demonstrates numerous violations of NEPA that can be rectified only through the creation of a new EIS. For these reasons alone, Barrington is likely to prevail on the merits, and the Board should stay its decision pending judicial review and compliance with NEPA and other governing environmental statutes.

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[61] Apparently for the same reason, the Board also neglected to use ideas offered by commenters during the scoping and DEIS comment phases to develop any independent alternatives. The sheer volume of commenters proposing specific alternatives throughout the EIS process strongly suggests that those alternatives were foreseeable, and merited additional analysis. Yet the Board failed to engage in any analysis of those alternatives. *See Busey*, 938 F.2d at 195-196 (agency must review reasonable alternatives).

[62] *See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812 (9th Cir. 1999) (agency failed to take requisite hard look when it considered only no action alternative, and two nearly identical action alternatives); *Simmons*, 120 F.3d at 666-7; *Davis*, 302 F.3d at 1122 (environmental study failed to adequately discuss alternatives when it dismissed alternatives in a conclusory and perfunctory manner based on purpose and need, and only no build and preferred alternative were studied in detail); *Nat'l Wildlife Fed'n v. Andrus*, 440 F.Supp. 1245, 1253-54 (D.D.C. 1977) (agency impermissibly rejected two alternatives with only cursory statements, as review of alternatives is the "linchpin of the entire impact statement") (internal quotations marks omitted).

B. The Board Violated NEPA By Failing To Analyze The Touted Benefits Of The Proposed Action

Without any independent analysis, evaluation or review, the Board presumed the benefits of the proposed action and merely adopted Applicants' purported benefits of the proposed action. The presumption of benefits without analysis or evaluation by the Board distorted the true environmental impacts of the proposed action. While SEA analyzed harms of the proposed action before counting them as adverse impacts, it did not require the same for benefits In so doing, SEA skewed the EIS and distorted the actual environmental impacts of the proposed action for the Board and the public. This violated NEPA and made the Board's approval of the proposed action virtually a forgone conclusion.

1. NEPA Requires The Board To Analyze The Effects, Both Beneficial And Detrimental, Of The Proposed Action

The requirement that the environmental impact statement contain an analysis of both potential harms and benefits of the proposed action flows from the language of NEPA and from the Council on Environmental Quality's ("CEQ") implementing regulations. NEPA specifies that an essential ingredient of an EIS is the "environmental impact of the proposed action."[63] The CEQ regulations define "impacts/effects"[64] to mean effects "resulting from actions which may have *both beneficial and detrimental effects....*"[65] When evaluating the intensity or severity of an impact, the agency must look at "both beneficial and adverse" impacts.[66] Thus agencies

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[63] 42 U.S.C § 4332(c)(i) (2000).

[64] "Effects" and "impacts" are used synonymously in the CEQ regulations 40 C F R § 1508 8(b)

[65] *Id.* (emphasis added)

[66] *Id* at § 1508 27(b)(1)

must include in the EIS an evaluation of both the harms of the proposed action and the benefits.[67] The proposed action is what triggers the NEPA review, and an environmental impact statement that fails to analyze its environmental impacts of the proposed action, both good and bad, subverts the NEPA process

The statutory duty falls upon the preparing agency itself to analyze the environmental effects of the proposed action in the EIS. The preparing agency has the duty to compare the benefits and harms of the proposed action to the benefits and harms of all feasible alternatives in order to provide a clear basis for choice among options by the decision maker and the public.[68] Failure to properly analyze both the benefits and harms of the proposed action critically skews the EIS and taints any comparative analysis that follows.

Indeed, the Board agrees that it has an obligation to take a "hard look" at both benefits and harms under NEPA.[69] The Board believes that it has met its burden, but it has not.

2. The Board Violated NEPA By Assuming, Without Support, The Purported Benefits And By Adopting The Applicants' Touted Benefits

Throughout the DEIS/FEIS, the Board gives short shrift to the analysis of the alleged benefits that Applicants suggest communities inside the EJ&E are would enjoy. For instance, SEA concludes that the proposed action will have beneficial effects on wildlife, declaring that

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[67] *See, e g , State of Alaska v Andrus*, 580 F 2d 465, 474 (D C Cir 1978) ("NEPA requires agencies to engage in a 'finely tuned and 'systematic' balancing analysis,' in which the environmental costs of proposed projects are compared to and balanced against their economic and other benefits " (quoting *Calvert Cliffs' Coordinating Comm , Inc v AEC*, 449 F 2d 1109, 1113 (D.C Cir. 1971), *vacated, in part*, 439 U S 922 (1978)), *Natural Res Def Council, Inc v. Morton*, 458 F.2d 827, 833 (D C Cir 1972), *see also Envtl Def Fund v Marsh*, 651 F 2d 983, 993 (5th Cir 1981) ("NEPA is concerned with all significant environmental effects, not merely adverse ones "), *Hiram Clarke Civic Club, Inc v. Lynn*, 476 F 2d 421, 427 (5th Cir 1973), *overruled on other grounds*, 442 U S 347, 358 (1979) (a close reading of NEPA disclosed that Congress was not only concerned with just adverse effects but with *all* potential environmental effects that affect the quality of the human environment)

[68] 40 C F R § 1502 14

[69] Decision at 3.

"the methodology *presumed* that areas with a reduction in train traffic would likely experience positive effects due to a decrease in rail operations."[70] The Board should have tested this theory by conducting analyses of whether and to what extent positive effects would result from the proposed action. This is mandated by NEPA. "A conclusory statement 'unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind' not only fails to crystallize issues, but 'affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives."[71]

Even if they last, the reductions in volume on CN routes inside the EJ&E arc are not so dramatic that the Board could simply assume they would benefit wildlife or, for that matter, automatically produce *any* benefits. SEA only addressed the number of *CN trains* remaining on CN's routes through Chicago following this shift of traffic to the EJ&E Line. This failed to fully account for the amount of traffic and the amount of congestion that will remain on the CN routes in Chicago because it ignored all non-CN trains and was arbitrary. For instance, SEA reported that a segment of the Elsdon Subdivision would be left with *no trains* after CN shifted its traffic to the EJ&E Line.[72] However, Barrington's estimate shows that on that same segment there still will be an average of more than twelve (12) trains per day after the shift as a result of non-CN trains moving over that segment. This failure to account for third-party train traffic runs through all of the Board's assumptions about benefits for communities inside the EJ&E arc.

The DEIS/FEIS is rife with other instances where the Board expressly declined to evaluate the purported benefits of the proposed action:

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[70] FEIS, at 3.3-12 (emphasis added), 3.4-325

[71] *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (internal citations omitted)

[72] *See* DEIS, Figure ES-2, FEIS, Figure ES-3

- With respect to noise, "SEA did not perform this analysis on the CN segments...;"[73]

- With respect to property values, "SEA did not attempt to calculate the effect of reducing the number of trains on the CN rail lines as a result of the Proposed Action ... ;"[74]

- Despite touting it as a benefit, SEA admits that it "did not examine the extent to which the Proposed Action would relieve rail congestion in the Chicago metropolitan area, nationally or internationally";[75]

- "SEA did not prepare a cost-benefit analysis in the DEIS."[76]

To make up for its failure to properly analyze the purported benefits of the proposed action, the Board refers to Applicants' self-serving purported benefits as a proxy for its own independent evaluation. Exactly like it did for the Purpose and Need, the Board adopts wholesale Applicants' touted benefits:

> SEA *did not examine* the extent to which the Proposed Action would relieve rail congestion in the Chicago metropolitan area, nationally or internationally. However, *CN states the Proposed Action would*: 1) improve the fluidity of intermodal and other CN traffic that must move into, from or through Chicago; 2) result in more efficient rail operations; 3) decrease the traffic density on CN and other rail lines in Chicago's urban core, and 4) reduce congestion and provide for faster movement of shipments on CN rail lines. CN maintains that shippers would benefit from shortened transit times through the Chicago Terminal District.[77]

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[73] DEIS at 4 10-14.

[74] FEIS at 2-86

[75] *Id.* at 3 4-73

[76] *Id* at 3 4-75

[77] *Id.* at 3.4-73 (emphasis added)

Other examples of the Board "cutting and pasting" of Applicants' purported benefits of the proposed action can be found throughout the FEIS [78] The assumption of benefits is no substitute for analysis and here is so vast as to be arbitrary and capricious and a violation of NEPA

C. The Board Violated NEPA By Failing To Evaluate Reasonably Foreseeable Indirect Effects

CN proposes to redirect freight rail traffic from its existing lines onto the EJ&E Line. The Board concluded that this shift would place the EJ&E Line at full capacity. The Board also concluded that the reduction of CN traffic on its lines and routes where it operates pursuant to trackage rights inside the EJ&E arc would create new capacity on routes in Chicago. The Board recognized the importance of Chicago to the North American freight railroad network and that demand for freight rail transportation in the Chicago area would nearly double by 2020, obviously including the next six years which are within the study period.

Yet, the Board concluded that it did not need to analyze the possibility that CN would fully double-track the EJ&E Line or double-track more of the EJ&E Line than the 19 miles called for in Applicants' Operating Plan. In addition, the Board concluded that it did not need to analyze the possibility that current traffic of other railroads or future traffic of CN or other railroads would consume the capacity created by the proposed action. The Board concluded that a complete double-tracking of the EJ&E Line (or any more double-tracking than that called for in the Operating Plan) was not reasonably foreseeable. The Board concluded that in-fill of the routes currently used by CN inside the EJ&E arc was "speculative" and did not need to be analyzed.

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[78] *See id* at 3 4-56 to 57 ("According to Applicants, the Proposed Action would also provide regional transportation benefits "). *id* at 3 4-58 ("The overall benefit, according to CN, is ."), *id* at 3 4-104 to 105 ("According to CN, and as described in the DEIS, approval of the Proposed Action would ")

Under NEPA, an agency preparing an EIS has an obligation to analyze the effects of the proposed action to the extent a person of ordinary prudence would determine that the effects were reasonably foreseeable A person of ordinary prudence, aware of the projected traffic growth in the vital rail hub of Chicago, would not conclude that the proposed action would place the EJ&E Line at full capacity *and* conclude that the double-tracking of the EJ&E Line was not reasonably foreseeable. In doing so, the Board failed its duty under NEPA to take a hard look at the reasonably foreseeable possibility of the double-tracking of the EJ&E Line and the environmental consequences of the double-tracking.[79]

Similarly, a person of ordinary prudence, aware of the projected traffic growth in the vital rail hub of Chicago, would not recognize the capacity created by the significant reduction in traffic on the routes CN operates on in Chicago *and* then summarily conclude that the in-fill of such routes was speculative. The Board's failure to analyze the environmental effects of the foreseeable in-fill of the CN existing routes violates the Board's obligation under NEPA to take a hard look at the effects of such an in-fill.

1. NEPA Compels An Agency To Evaluate The Reasonably Foreseeable Indirect Effects Of A Proposed Action

CEQ regulations promulgated to implement NEPA require agencies to include "indirect effects" in their evaluation of a proposed action [80] Indirect effects, including growth inducing effects, are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,"[81] and are "sufficiently likely to occur that a person of ordinary prudence

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[79] Moreover, the fact that EJ&E could double-track the line today does not excuse the Board from its obligation to evaluate the environmental impact of the double tracking likely to occur because of the proposed action

[80] 40 C F R § 1502.16(b), *see Robertson v Methow Valley Citizens Council*, 490 U S 332, 356 (1989) (holding that the CEQ regulation requiring consideration of indirect effects "is entitled to substantial deference")

[81] 40 C F R § 1508 8(b)

would take [them] into account in reaching a decision."[82] When the nature of an indirect effect is reasonably foreseeable, "but its extent is not, ... [an] agency may not simply ignore the effect."[83] It must analyze the effect

In *Senville v. Peters*, the Court held that a state transportation agency and the Federal Highway Administration did not comply with NEPA when their EIS had only a "cursory examination" of indirect effects that failed to "set forth sufficient information" for the Court to evaluate.[84] In *Mid States*, the Eighth Circuit held that the Board violated NEPA by not "examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption" due to the construction of a railroad line designed to haul coal.[85]

2. The Board Improperly Failed To Analyze The Reasonably Foreseeable Possibility That CN Will Construct Double Track On The Entire EJ&E Rail Line

In response to comments on the importance of freight and passenger rail service in the Chicago region and comments on the upward trend in both the number and length of freight and passenger trains in recent years, the Board observed that:

- Chicago is the nation's preeminent rail hub with 2,800 miles of rail lines,
- data from CREATE indicating that the daily rate of rail cars traveling through the Chicago hub will rise from a current level of 37,500 to 67,000 by 2020;[86]
- "[o]ver the next 20 years, demand for freight rail service through Chicago is expected to nearly double"[87] and that "[t]hese trends in existing conditions have been corroborated by many commenters;"[88]

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82 *Sierra Club v Marsh*, 976 F.2d 763, 767 (1st Cir 1992)

83 *Mid States Coalition for Progress v Surface Transp Bd*, 345 F 3d 520, 549 (8th Cir. 2003) ("Mid States") (emphasis omitted).

84 *Senville v Peters*, 327 F Supp 2d 335, 349 (D Vt. 2004)

85 *Mid States*, 345 F 3d at 550

86 FEIS, at 3 4-95

- Chicago is the only city in the United States where six major North American railroads meet to interchange freight;
- seven of the rail lines entering Chicago are part of a Strategic Rail Corridor Network, which is critical to the national defense;
- Chicago is the busiest rail gateway in the United States;
- according to CREATE, Chicago handles one-third of the nation's rail freight traffic;
- other freight railroads use the EJ&E Line as a bypass around Chicago; and
- absent the EJ&E Line, other railroads would need to bring their trains through the city center.[89]

The Board also concluded that, upon the implementation of CN's proposed Operating Plan, the EJ&E Line will be "at or near its practical train volume capacity."[90]

SEA's comments on the foreseeability of CN double-tracking all of the EJ&E Line or more of the EJ&E Line than contemplated in the Operating Plan are liberally distributed throughout Chapter 3 of the FEIS.[91] The Board summarily dismissed comments on the foreseeability of double-tracking to accommodate more traffic being diverted onto the EJ&E Line, saying:

> However, double-tracking the entire EJ&E rail line would not be necessary for projected or evolving CN traffic. If rail traffic were to nearly double by 2020 in Chicago it would be distributed over the many railroad lines that operate in the Chicago area. Therefore, SEA cannot reasonably foresee which future traffic CN

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87 *Id.*

88 *Id*

89 *Id*

90 *Id* at 3 4-57, *see also id* at 3 4-63, 3 4-79, 3 4-85, 3 4-96, 3.4-108

91 Applicants' Operating Plan calls for the double-tracking of approximately 18 miles of the EJ&E Line The comments discussed here relate to foreseeability of double-tracking all of the EJ&E Line or more of the EJ&E Line than is contemplated by the Operating Plan

> would carry over the EJ&E rail line or where capacity constraints might lead CN to build new double tracks.[92]

The fact that the Board cannot plot the routings of all freight rail traffic growth in and around Chicago does not mean it can assume that none of the traffic growth would be routed onto the EJ&E Line. Unless none of the traffic growth would be moved on the EJ&E and the Board can explain why, the failure to consider the environmental impact of further double-tracking is arbitrary and capricious. The leap from the first idea (we cannot predict precisely what new traffic will move where in Chicago) to the second idea (and so we it will assume none of the new traffic will move over the EJ&E) is just too vast.

In response to other comments on the need to evaluate the impact of future double-tracking of the EJ&E Line, the Board claimed that it "analyzed all reasonably foreseeable effects of the proposed action and construction and determined that there would be no double track or connection construction beyond those identified ... as part of the proposed action."[93] In response to comments on how the additional double-tracking might induce further traffic growth, the Board asserted that the "extent to which demand for rail capacity may increase in the future [is] speculative and [was] not analyzed."[94]

In response to comments on the capacity of the EJ&E Line for third party operations, SEA mentions none of the trends and projections on Chicago traffic growth and instead writes that, "while global 20-year freight projections have been high, there is *no guarantee* that the projected increases would in fact materialize, or if they did, that the resultant traffic would flow

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[92] FEIS, at 3 4-365 to 366.

[93] *Id* at 3 4-412 to 413.

[94] *Id* at 3 4-63, 3 4-108

through Chicago on the EJ&E rail line or that CN would garner more than its share of the volume to be transported."[95]

In response to other comments on capacity issues, the Board maintained that bottlenecks on the EJ&E Line would restrict rail traffic on the EJ&E Line to the volume projected by CN in their proposed action.[96] The Board then acknowledged, however, that CN "could alleviate the bottlenecks ... by making track or operational improvements."[97]

In comments on the Board's DEIS, the EPA "requested that [the Board] project traffic growth on the ... EJ&E Line if current bottlenecks can be reduced."[98] In response to the EPA, the Board simply stated that, "there would continue to be some bottlenecks on the EJ&E rail line that would continue to restrict train volumes to no more than the number reported in the Application,"[99] and that "CN would be unlikely to double track the entire EJ&E rail line without first addressing the East Joliet bottleneck."[100] However, the Board never explained why it was not reasonably foreseeable that CN would "address" the East Joliet bottleneck through track or operational improvements, and thereby clear the path for double-tracking the full EJ&E Line to meet increased demand.

Armed with the projected traffic growth in the vital rail hub of Chicago and after concluding that the proposed action would place the EJ&E Line at full capacity, a person of ordinary prudence would find that double-tracking of the full EJ&E Line is a reasonably

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[95] *Id.* at 3 4-123 to 124 (emphasis added)

[96] *Id.* at 3 3-39

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 3 4-85

foreseeable indirect effect that is "sufficiently likely to occur" and would analyze it.[101] Indeed, in his separate comment accompanying the Decision, Vice Chairman Mulvey wrote, "I would have preferred an approach that closely tied increasing levels of mitigation at applicants' expense to increasing levels of rail traffic, above the projections used in our analysis of this case."[102] At a minimum, this expresses some skepticism about the likely future level of traffic on the EJ&E Line

The Board improperly refused to analyze these projected demand increases and their impact on the Board's traffic predictions. NEPA requires the Board to not only evaluate "guaranteed" scenarios, but also those reasonably foreseeable to occur.

3. The Board Improperly Failed To Analyze The Reasonably Foreseeable Possibility That CN Or Other Railroads Will Fill The Capacity On Routes Where CN Will Reduce Current Traffic

As a result of the proposed action, CN will shift rail traffic from all of its five existing rail lines and certain other lines in Chicago on which it operates with trackage rights to the EJ&E Line [103] Rail traffic on the routes on which CN currently operates would decrease "by as many as 19 trains per day on some rail line segments."[104] The Board noted that "[i]nduced rail demand could occur on rail lines that have the capacity for growth and are on corridors on which growth might occur."[105] The Board acknowledged that the existing CN rail lines "could certainly accommodate additional rail traffic."[106]

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[101] *See Sierra Club*, 976 F.2d at 767

[102] Decision at 56

[103] *See, e g* , FEIS, at 3 4-62, 3 4-63, 3 4-71, 3 4-108

[104] *Id* at 3 4-103

[105] *Id.* at 3 4-111

[106] *Id*

As noted above, the Board also noted the strategic importance of Chicago in the nation's freight rail network and the recent upward trends in both the number and the length of freight and passenger trains and the projections for a doubling of freight traffic in Chicago by 2020.

In response to comments pointing to the potential for CN to increase trains on existing CN routes inside the EJ&E Line. The Board wrote that it is,

> [I]mportant to understand that the average length of a rail freight haul is 900 miles (U.S. Bureau of Transportation Statistics 2005) SEA concluded that it is speculative to predict whether any future long-distance freight moves would include the existing CN rail lines.
>
> CN has not provided information on, nor is SEA aware of any sources of, substantial increases projected for train demand for local customers or switching operations on existing CN rail lines operating in and out of Chicago [107]

This does not respond to the most important aspects of the comments. CN is not reducing traffic only on its five lines segments. CN is reducing traffic on all of its owned line segments *and* its trackage rights in Chicago inside the EJ&E arc that, together function as a through route for CN CN has trackage rights on the double-tracked, largely grade-separated Indiana Harbor Belt Railroad ("IHB") and the Baltimore and Ohio Chicago Terminal Railroad ("BOCT"). CN also has a through route from Schiller Park Yard over the BOCT past UP's Global II Yard and across the St. Charles Airline. Numerous other railroads own or operate on segments of the routes today inside the EJ&E arc. SEA says it concluded that it is speculative to predict whether *any* future long-distance freight moves would include the *existing CN Lines*. The basis for this conclusion does not appear in the DEIS or the FEIS. The Board does not address whether *other* freight railroads will use the capacity created by the reduction of CN trains on CN's existing through route for *current* traffic or whether CN or other freight railroads will use the existing CN

[107] *Id.* at 3 4-104

through route *as traffic grows* in the Chicago region. Similarly, the fact that CN has not provided and SEA is not aware of substantial increases in *local* traffic on *existing CN rail lines* is not dispositive. The relevant question, not addressed by the Board, is whether other freight railroads will use the capacity created by the reduction of CN trains to *alter* their current or future service to local customers inside the EJ&E arc or change their current or future switching operations.[108]

In response to other similar comments regarding increases in traffic on the routes where CN will have reduced traffic, the Board asserts that such a traffic growth is "speculative."[109]

The Board's unsupported conclusion regarding the projected demand for freight rail service along CN's existing through routes shows the Board's failure to take a "hard look" at the reasonably foreseeable indirect effect of CN or other carriers soon filling the capacity on CN's existing routes. CN or other carriers increasing traffic on CN's existing routes in the near future is certainly "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[110]

In his separate comment accompanying the Decision, Commissioner Buttrey wrote, "I would have imposed strict traffic caps on the existing CN lines within the City of Chicago as CN's trains are shifted to the outer EJE lines, to ensure that the *touted* benefits of reduced traffic

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[108] As SEA noted, "[i]f rail traffic were to nearly double by 2020 in Chicago it would be distributed over the many railroad lines that operate in the Chicago area." FEIS, at 3 4-366

[109] *Id* at 3 3-57 ("The extent to which the CN subdivisions may experience rail traffic above that which is currently planned is speculative at this time"), *id* at 3 4-76 ("The extent to which the CN subdivisions may experience rail traffic above that which is currently planned is speculative and was not analyzed"); *see also id* at 3 4-111 ("Many of the rail lines inside the arc over which CN now operates could certainly accommodate additional rail traffic but are on corridors over which regional or national rail traffic is not likely to be routed")

[110] *Sierra Club*, 976 F 2d at 767

on the inner city lines would be preserved."[111] At a minimum, this expresses some skepticism about the Board's failure to evaluate possible in-fill of the existing CN lines and the longevity of the "benefits" of the proposed action. However, it does not cure the Board's failure to analyze the reasonably foreseeable indirect effect of the decrease in CN's current rail traffic on its existing routes inside the EJ&E arc.

4. At Least One Of The Two Indirect Impacts Is Foreseeable

Even if the Board somehow is found to have properly determined that CN would not partially or fully double-track the EJ&E Line or properly determined that the new capacity on CN's through routes in Chicago would not be in-filled with current or future traffic, the Board could not have properly determined that *both* of these developments are speculative. After acknowledging the likelihood that demand for freight rail traffic will nearly double by 2020, a person of ordinary prudence would conclude that it is foreseeable that CN or other carriers will meet this demand by increasing rail traffic on either CN's through route or the EJ&E Line. The traffic is coming and it has to move somewhere. The inference that none of it will move on any CN routes is arbitrary and capricious.

D. The Board Failed To Respond To Comments On Key Elements Of The Analysis In The DEIS

An agency has an obligation to assess and consider all comments both individually and collectively, and to respond to all comments by: modifying or adding alternatives; supplementing, improving, or modifying its analysis; making factual corrections and/or *explaining* "why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those

[111] Decision at 57 (emphasis added)

circumstances which would trigger agency reappraisal or further response."[112] An agency's response to comments is an essential part of its disclosure analysis under NEPA.[113] The Board failed to meet its obligation under NEPA to respond to all comments. Although an agency has an obligation to respond to all comments, the ignored comments itemized below are examples of responsible and reasoned comments that would be readily apparent to an agency making a good faith effort to meet its response obligations.

1. The Board Failed To Respond To Comments Regarding The Significant Noise Impacts From The Proposed Action

Commenters had significant comments on SEA's noise impact analysis:

- EPA asked SEA to explain why noise mitigation at an Ldn of 65 dBA was unreasonable. SEA did not respond.
- EPA asked SEA to modify the proposed noise mitigation or add new noise mitigation measures in the FEIS. SEA did not; nor did it explain why it did not.
- DOI concluded that the DEIS did not fully disclose all project impacts to natural resources and recommended that the FEIS require noise barriers in areas where birds congregate. SEA neither accepted the recommendation nor did it provide any meaningful explanation of its decision to reject it
- Commenters asked SEA to explain the criteria for determining "reasonability and feasibility" of noise mitigation SEA did not do so

With respect to each of the foregoing points, the Board has failed to meet it obligation to respond to comments and disclose the impact of the Proposed Action.

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[112] 40 C F R § 1503.4

[113] *Or Natural Desert Ass'n v Bureau of Land Mgmt*, 531 F 3D 1114, 1120 (9th Cir 2008)

2. The Board Did Not Explain Why Noise Mitigation At An Ldn Of 65 Dba Is Unreasonable

EPA asked SEA to justify the statement that noise mitigation at an Ldn of 65 dBA is unreasonable.[114] In response, SEA asserts that use of a 70/+5 dBA Ldn contour for mitigation is consistent with prior Board decisions, has been affirmed by the courts, is "essentially equivalent" to 65 dBA Leq and that Applicants have offered substantial noise mitigation and that SEA has proposed additional noise mitigation.[115]

SEA does not explain why noise mitigation at an Ldn of 65 dBA is *unreasonable*. That was EPA's question. SEA's response purports to answer a *different*, arguably similar question (whether the 70/+5 dBA Ldn contour for mitigation is reasonable), but SEA does not even answer that question. SEA has used 70/+5 dBA Ldn contour for mitigation in other Board cases,[116] but that does not explain why it used it again here. Courts have addressed many noise issues in prior Board cases that used a 70/+5 dBA Ldn contour for mitigation, but Barrington did not discover any such cases where the reasonableness of the 70/+5 dBA Ldn contour was an issue.[117] SEA does not explain its assertion that the 70 dBA Ldn value is "essentially equivalent" to the 65 dBA Leq. In fact, as explained below, it is not and although this was explained to the agency, it failed to address why it rejected these concerns. Finally, the noise mitigation measures do not explain the reasonableness of the 70 dBA Ldn contour. In fact, as

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[114] FEIS, Appendix L, at L 3-3

[115] *Id* at 3 3-48.

[116] Although there are no citations here, Petitioner believes the Board is referring to the Dakota, Minnesota & Eastern construction case and the Conrail case, cited in the next footnote

[117] For example, it was not an issue on appeal in the Dakota, Minnesota & Eastern construction case or in the Conrail merger *See Mid States; Erie-Niagara Rail Steering Comm v. Surface Transp Bd*, 247 F 2d 437 (2d Cir 2001).

explained below, the noise mitigation measures do not require Applicants to actually do anything, let alone mitigate receptors within the 70 dBA Ldn contour.

The 70 dBA Ldn value is not "essentially equivalent" to the one hour 65 dBA Leq. The Ldn measures noise over a 24 hour period adding a 10 decibel "penalty" for noise between 10 p.m. and 7 a.m. The two measurements are not comparable, because an environment with noise at 70 dBA Ldn can have greater impact than another environment with noise at 65 dBA Leq. For example, the Noise Abatement Criteria for residences used by the Federal Highway Administration ("FHWA") to measure noise impacts on highway projects evaluates noise impacts at 66 dBA Leq The loudest hour often occurs during a morning or evening rush hour period. Noise levels are typically lower during the balance of the day and much lower at night. If FHWA used Ldn, the measured level over 24 hours (even with the penalty) could be lower than 66 decibels

The noise mitigation measures do not require Applicants to actually do anything, let alone mitigate receptors within the 70/+5 dBA Ldn contour. The Board's noise mitigation is comprised of 12 voluntary mitigation measures and 5 mitigation recommendations made by SEA.[118] Voluntary mitigation measures 3 through 5 relate to quiet zones, but like many of the voluntary mitigation measures they merely require the Applicants to *consult* or *cooperate* with identified federal, state and local governments. Voluntary mitigation measures 6 and 7 have the same weakness and have only an indirect bearing on noise mitigation For example, VM 7 requires Applicants, *six months after* the take-over, to *cooperate* with state and local agencies to *coordinate* a review of grade crossings to *examine* safety and the adequacy of existing warning

[118] FEIS, at 4-29 Specifically, voluntary mitigation measures 3-7, 77-83 and mitigation recommendations 29-31, 50 and 51.

devices and *identify* remedies to improve safety.[119] This does not require the Applicants to actually do anything.

The same pattern is revealed in VMs 77-83. For example, VM 77 only obligates Applicants to *work with* communities to mitigate train noise to levels *as low as* 70 dBA by *cost effective* means as are *agreed to* by the communities and Applicants. Absent an agreement, Applicant are only obligated to input *cost effective* mitigation that *could include* such measures as noise barriers, berms, or enhanced warning devices. In other words, VM 77 does not actually obligate Applicants to proactively construct or establish any tangible form of mitigation. VMs 78 and 79 are additional consultation provisions related to construction noise; VM 80 obligates Applicants to *consider* lubricating curves under certain circumstances; VM 81 requires Applicants to use AREMA standards on the installation and maintenance of rail and rail beds; VM 82 requires Applicants to comply with existing FRA regulations establishing decibel limits for defective railroad equipment. Except for VM 83, which only requires Applicants to install a single Wheel Impact Load Detector anywhere on the EJ&E Line within three years, none of these voluntary mitigation measures actually requires Applicants to do anything.[120]

The SEA mitigation recommendations follow the same toothless pattern. SEA measure 29 requires Applicants to *consult* with communities affected by wheel squeal and *cooperate* with respect to VM 80.[121] In other words, Applicants must *cooperate* when they *consider* lubricating

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[119] *Id* at 4-33

[120] *Id* at 4-41 to 42.

[121] *Id* at 4-51

curves under certain circumstances.[122] SEA measure 31 requires Applicants to report on their compliance with VMs 77-83.[123]

Taken together, the noise mitigation is a house of cards. It is an aggregation of vague, unenforceable, post-transaction consultation and cooperation provisions. In addition, it does not respond to yet another EPA comment that "mitigation be part of the EIS process and not be developed at a later time" as was proposed in the DEIS.

3. The Board Has Not Responded To EPA's Comment On The Need For Noise Wall Mitigation Now

The DEIS asserted that it is appropriate for Applicants to determine where noise walls would provide noise reductions for receptors that are within the 70 dBA Ldn contour.[124] In response to this, EPA wrote that "it is important that this [noise] mitigation be part of the DEIS process and not be developed at a later time as currently proposed."[125] In response to EPA, SEA says that "[n]oise walls, berms, insulation, etc are all options that *could be considered* if warranted under SEA's final recommended mitigation."[126]

SEA did not modify the DEIS noise mitigation or add new noise mitigation measures in the FEIS. All of the noise mitigation remains in the words of the EPA to "be developed at a later time" just as it did in the DEIS. SEA does not *explain* why it did not change the noise mitigation

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[122] SEA measure 30, pertaining to vibration mitigation, requires Applicants to make *reasonable efforts* to notify the Fermi Laboratory of potentially significant operational changes that could affect the Lab's vibration-sensitive equipment *Id* at 4-51 This would not require Applicants to do anything about operational changes that could affect the Lab's equipment

[123] *Id* at 4-51. SEA measure 50 does not relate to train noise It requires implementation of unidentified and unspecified best management practices to minimize construction noise and vibration SEA measure 51 requires Applicants to comply with an AREMA standard on rail curves construction, which they undoubtedly routinely comply with in any case *Id* at 4-53.

[124] DEIS, at 4 10-29

[125] FEIS, Appendix L, at E 3-3

[126] *Id* at 3 3-48

to make it part of the EIS process. SEA has not responded to EPA's comment on the need for noise wall mitigation *now*.

a. The Board Did Not Respond To The Department Of Interior's Comments On Noise Barriers

DOI concluded that "the DEIS does not fully disclose all potential project impacts to natural resources."[127] To address potential impacts on natural resources, the DOI recommended (among other things) that the FEIS include a requirement that Applicants "construct noise barriers in all areas where the EJ&E arch crosses through or is adjacent to a natural area that has been identified in the DEIS as an area where birds are concentrated "[128] DOI recommended that Applicants be required to review existing research on height, shapes and materials used to construct bird and wildlife noise barriers and offered the technical assistance of the U.S. Fish and Wildlife Service ("USFWS").[129] DOI recommended that the noise barriers be constructed to keep the noise levels below 50 dBA in the areas where birds are concentrated and said that the FEIS should discuss the use of noise barriers to mitigate potential impacts on other wildlife.[130] In response, SEA reported that the "Board has considered noise walls and other barriers *in prior Board proceedings* and found them to *often* be prohibitively expensive and of marginal utility, given the many 'gaps' such barriers would have to have to provide for vehicle crossings."[131]

SEA has not responded to DOI's comments on noise barriers. The Board does not identify the prior Board proceedings in which it evaluated noise barriers designed to protect birds

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[127] *Id*., Appendix E, at E 1-5

[128] *Id*

[129] *Id*

[130] *Id*

[131] *Id.* at 3.3-28

and other wildlife. It may very well be that such noise walls are *often* prohibitively expensive and/or of marginal utility, but SEA's unsubstantiated generalization is woefully inadequate here, especially given the fact that DOI recommended noise barriers to remedy its separate concern that the DEIS does not fully disclose all potential project impacts on natural resources. In addition, SEA does not explain whether and to what extent it had reviewed current research on heights, shapes and material used to construct noise barriers for birds and wildlife, it did not address whether and to what extent it had considered the use of such walls in conjunction with wildlife crossings; and it did not discuss whether technical assistance offered from USFWS could overcome expense and/or utility issues in connection with bird and wildlife noise barriers in *this* case. SEA did not respond to DOI's recommendation that the walls be used to reduce noise levels to 50 dBA or even a higher noise level.[132] SEA also fails to respond to DOI's question requesting that SEA address the efficacy of using noise walls as a potential mitigation measure with respect to other wildlife.[133]

b. The Board Did Not Clarify The *Criteria* For Determining The Reasonability And Feasibility Of Noise Barriers

Commenters stated that the criteria for determining "reasonability and feasibility" of noise mitigation was not provided in the DEIS.[134] In response, SEA indicates that Chapter 2 of the FEIS "clarifies the criteria for determining reasonability and feasibility."[135] Chapter 2 contains no such discussion.[136] Chapter 2 of the FEIS does refer the reader to Appendix A.8,[137]

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[132] *Id*., Appendix E, at E.1-5.

[133] *Id*

[134] *Id* at 3 4-291

[135] *Id.*

[136] *See id.* at 2-107 to 110

which contains noise and vibration contour maps of the EJ&E showing locations where SEA determined that noise mitigation measures would be cost-effective and where it determined such measures would not be cost-effective.[138] However, nothing in Chapter 2 or in Appendix A.8 explains what factors SEA used to determine the feasibility or the reasonableness of noise mitigation barriers. Thus, the FEIS does not clarify the *criteria* for determining the reasonability and feasibility of noise barriers.

The public does not know how much noise reduction would be achieved in the areas where SEA indicates that a noise barrier would be cost-effective. The public does not know how many receptors would be protected by barriers in the area where SEA deemed barriers to be cost-effective. The public does not know why SEA deemed barriers to not be cost-effective in the areas so designated. The public does not know, for example, whether the noise wall would be unfeasible because it would not reduce noise or whether it would be unreasonable because of the expense. SEA has left the public completely in the dark with respect to the criteria used to determine reasonability and feasibility of the noise mitigation.

4. The Board Has Not Responded To EPA's Comment On The Need For Projected Emissions For Kirk and Joliet Yards

The DEIS included a general conformity and air toxics assessment.[139] In response to this, EPA wrote that "diesel particulates were not included in the air toxics analysis, and should be added in the FEIS. Both the conformity analysis and the air toxics 'hot spot' analysis should

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[137] *Id* at 2-110.

[138] *Id*., Appendix A, at 121 to 162

[139] *See* DEIS, at 4 9-1 to 4 9-32

include projected emissions for the Kirk and Joliet Yards, which will experience significantly increased operations if the proposal is implemented."[140]

The Board did modify its air toxics analysis to include diesel particulate matter in the FEIS, but it did not analyze diesel particulate emissions for Kirk and Joliet Yards specifically as requested by EPA. The air study in the FEIS is not site-specific. In a feeble attempt to address the emissions at Kirk and Joliet Yards, SEA states that it "include[d] a qualitative discussion based on over 20 health risk analyses for rail yards published in the past 2 years by the California Air Resources Board."[141] In fact, SEA only references this California Air Resources Board study when generally describing the parameters used in its model. Certainly, no "qualitative discussion" of the study or its relevance to Kirk and Joliet Yards is contained in the FEIS.

The increased use of these yards is a major component of the proposed action and EPA rightly is concerned about the harmful effects of diesel particulate matter spewing from moving and idling trains and specifically asked for analysis of emissions at and surrounding the yards. SEA's attempt to use its one-line reference to a rail yard study as a way of disposing of EPA's pointed comment about the deficiencies of its air emissions study is not responsive.

5. The Board Has Not Adequately Responded To Barrington's Concerns Regarding Applicants' Revised Fuel Use Estimates

Barrington previously commented[142] on SEA's adoption of a second revised set of fuel use estimates based on supplemented fuel use information submitted by the Applicants in their May 23, 2008 filing. The revised estimates are not substantiated by the Applicants. Save for some brief qualitative assumptions, no back-up data is provided to verify the validity of the

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[140] FEIS, Appendix E at E 3-1 to 3-2

[141] FEIS, at 3 3-41

[142] *See* Barrington Comments on DEIS, at 58-63

revised fuel use information SEA did not independently confirm the accuracy of the revised estimates, but did adopt them whole cloth. SEA simply stated that they are "a more accurate assessment of the net fuel-use change."[143] Using the unsubstantiated revised fuel use estimates conveniently avoided the 100 tons/year conformity threshold that would have triggered mitigation. SEA's brief statement did not adequately respond to Barrington's comments regarding the revised estimates.

6. The Board Did Not Respond To The Conclusions Of Barrington's Traffic Analysis

In its response to the DEIS, Barrington asserted that the methodology used in the DEIS to measure "significant impact" not only lacked the necessary sophistication to accurately measure roadway impacts, but was also seriously flawed in how it applied standard analysis tools. To overcome those flaws, Barrington conducted a rigorous traffic analysis of the impacts of the proposed action on Barrington's street network which yielded dramatically different impact assessment results In the FEIS, the Board completely ignored Barrington's study and failed to respond to any of the questions raised regarding flaws in its analysis procedures. Instead, the Board conducted its own sophisticated *Village of Barrington Traffic Operational Analysis*, using the same traffic modeling software that Barrington used. Even though the Board's analysis yielded significantly different results than the DEIS, the Board declared it validated the DEIS findings and ultimately reverted back to the original flawed analysis tools to draw its conclusions in the FEIS.

The DEIS used a three-part assessment of regional and local highway system impacts. One of the three criteria used was a comparison of changes in level of service ("LOS"). The DEIS analysis of the impact on regional and local highway systems used Highway Capacity

[143] FEIS, at 3 4-275

Manual ("HCM") terminology in the description of the LOS assessments, but it did not use actual HCM methodology.[144] In its comments on the regional and local highway system impacts in the DEIS, Barrington pointed out that SEA used HCM *terminology*, but not actual HCM *methodology* for the LOS assessment. This meant that SEA's LOS analysis did not accurately measure the impact of the proposed action on regional and local highway systems.[145] Barrington also explained that the LOS analysis compared *average* daily traffic volumes to estimated daily roadway capacity and; that it posited an isolated and idealized crossing where the daily traffic volume flowed over a crossing at a constant rate throughout the 24 hour-day.[146] Barrington explained that the DEIS analysis assumed crossing gates would be down for 20 seconds before a train and 10 seconds after a train, based on standards in the Manual Uniform Traffic Control Devices and that field observations at the crossings in Barrington indicated substantially longer gate-down times.[147] Barrington also questioned the DEIS's assumption that vehicular traffic would discharge across tracks at uniform rate and the assumption that the queue would entirely dissipate from one train before the next train event occurred.[148] Barrington further noted that the DEIS did not include the capacity assumptions and volume-to-capacity ("V/C") values of the individual roadway segments; did not include assumptions regarding the spacing of train events; and that the queuing analysis did not disclose the queue storage lengths to which the calculated maximum queue lengths were applied.[149] Barrington asserted that local agencies and interested

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[144] DEIS, at 4.3-3 to 4.3-7

[145] Barrington's Comments on DEIS, at 34-35

[146] *Id.* Barrington made the same criticism of the grade crossing assessment in the DEIS *Id.* at 13-15

[147] *Id.* at 35

[148] *Id.* at 36

[149] *Id.*

parties did not have the information necessary to critically evaluate the DEIS assessment of impacts of the proposed action on regional and local highway systems.[150] SEA made *no response* to these comments in the FEIS

In addition to the general comments on the regional and local highway system methodology in the DEIS, Barrington pointed out that the flaws in the methodology are particularly glaring with respect to crossings in Barrington To demonstrate this, Barrington undertook its own highway impact analysis It utilized VISSIM software[151] under a set of assumptions disclosed in the Barrington comments.[152] Barrington's analysis showed much greater impacts on roadways in the Barrington area than the inaccurate impacts shown in the DEIS analysis [153] SEA again made *no response* to the Barrington VISSIM analysis in the FEIS.

SEA did undertake an additional analysis of vehicular mobility and safety in the Barrington area. The results of that study are summarized in Section 2.5.11 of the FEIS[154] and the full analysis is included in Appendix A-5 of the FEIS. SEA indicates that its Barrington area traffic study was undertaken to (among other things) validate the analysis of the Draft EIS [155] SEA asserts that its Barrington traffic analysis validated the DEIS analysis. The SEA Barrington analysis does not document the *methodology* of the DEIS analysis and therefore it cannot possibly validate the LOS analysis. SEA states that "area-wide statistics are critical to the

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[150] *Id*

[151] VISSIM software is a program that models individual driver behavior and the resulting vehicle interactions to simulate actual traffic flows Traffic and transit operations are modeled under a number of constraints including roadway and railway configurations, speed limits, traffic composition, vehicle characteristics, traffic signals, train stops, train blockage, and driver behaviors.

[152] Barrington's Comments on DEIS, at 36-40

[153] *Id* at 40

[154] FEIS, at 2-48 to 49.

[155] *Id* at 2-48

evaluation of the overall efficiency of the transportation network."[156] However the criteria established in the DEIS to determine substantial impacts are applicable only to individual crossings, not regions. SEA's Barrington analysis looks at a much wider road network and therefore does not correspond to the DEIS analysis. SEA concludes that, based on its VISSIM analyses, under the proposed action scenario the "Barrington area total delay time increased by four percent and five percent *during the A.M. and P.M peak periods*, respectively, over the No-Action scenario."[157] It is unclear how this is a validation of the methodology used in the DEIS as reported in Table A.5-1, which shows that when comparing the No-Action scenario to the Proposed Action, the increases in Total Vehicle Traffic Delay over *a 24-hour period* are 1,277% at the U.S. Route 14 crossing, 1,256% at the Hough Street crossing, and 1,250% at the Lake-Cook Road crossing.

SEA's Barrington area study does not respond to the analysis submitted by Barrington SEA's Barrington analysis evaluates only A.M. and P.M peak periods, as opposed to a 24-hour weekday period as in Barrington's analysis.[158] It is unclear why SEA modeled only the peak periods, as these are the times when CN voluntarily stated that they will not run many freight trains. SEA's Barrington analysis does not capture the compounding effect of twenty trains over an entire 24-hour period. As noted above, SEA's Barrington analysis looks at a much wider road network.[159] SEA's results include roadway segments that are well outside the influence of the railroad crossings. By including long segments of roadways that are not impacted by train events in the area-wide results, SEA *dilutes* the impacts of the additional trains on the area roadways

[156] *Id.*, Appendix A-5, at 68

[157] *Id* at 2-49 (emphasis added)

[158] *Id* , Appendix A-5, at 64

[159] *Id* at 55-56

when comparing No-Action conditions to the proposed action conditions. In any case, the SEA Barrington analysis does not respond to the Barrington analysis.[160]

7. The Board Has Not Responded To Comments About Emergency Response Time

Barrington and various members of the Barrington community raised concerns in comments on the Board's DEIS about Barrington's dense configuration of at-grade roadway and railroad crossings and the adverse effect of the increased frequency and duration of gate-down times on the response times of Barrington emergency ("EMS") responders. The Board's response does not address Barrington's distinctive situation. The Board used a "one-size fits all" approach to emergency response issues.

In its comments on the DEIS, Barrington explained that:

- the EJ&E Line crosses four critical roads and the Metra/UP train line at grade in a span of 5,918 feet within Barrington's village limits as well as a fifth heavily-traveled road (Cuba Road) just east of the village limits;[161]
- the four highway/rail at-grade crossings within Barrington (Lake Zurich Road, US 14, Route 59 and Lake Cook Road) and the Metra/UP rail crossing are so tightly clustered that one freight train could shut down all four thoroughfares and the rail crossing simultaneously;[162]
- the headquarters for the fire, EMS and police services for Barrington and the surrounding communities are located in the Public Safety Facility on US Route

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[160] SEA also ignored Barrington's traffic analysis in the course of rejecting additional mitigation measures for Barrington. For example, SEA asserted that a grade separation project at IL 59 in Barrington or a rail trench were not warranted under present traffic conditions, and also because a grade separation would allegedly affect the character of the community by removing trees and/or buildings." FEIS, at 4-14, 15. SEA's cursory determinations in this regard appear to ignore Barrington's own traffic analysis, while incorporating without additional elaboration a mitigation standard based on alleged aesthetics.

[161] Barrington's Comments on DEIS, at 2.

[162] *Id.* In addition, a freight train blocking the Metra/UP line could cause a Metra or UP train on either side of the crossing to halt. The blockage of the crossing with respect to a UP freight train could have secondary effects on blocked crossings on that line. *See id.* at 34, 36-40.

14, less than one-quarter of a mile from the EJ&E Line/Route 14 at-grade crossing;[163]

- Barrington Fire Department Station #1, also located within the Public Safety Facility, provides primary response to Barrington and the surrounding communities and functions as the primary back-up for a majority of the area served by its two satellite fire stations;[164]

- the configuration of Barrington's road network, the location of its emergency facilities and the lack of grade separations on the EJ&E Line through Barrington mean that "CN's proposed transaction will create prolonged blockages and increased traffic congestion at all of the EJ&E grade-crossings in or near Barrington;"[165]

- the blockages would have a devastating impact on the ability of first responders to "access the scene on an emergency *and* transport accident victims to critical care facilities in a timely manner;"[166] and

- the delay of minutes or even seconds in an emergency response context can mean the difference between life and death [167]

Karen Lambert, President of Advocate Good Shepherd Hospital ("Good Shepherd," the only critical care facility in Barrington), commented that:

- the DEIS ignored the effect of the proposed action on the transportation of patients to Good Shepherd,[168]

- the increased frequency of CN trains and their length will not allow EMS to transport patients to Good Shepherd;[169]

- "time is the greatest threat to a critically ill or injured patient . area mortality rates for patients will increase, and overall patient outcomes ... will suffer,"[170] and

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[163] *Id* at 3

[164] *Id*

[165] *Id.* at 41.

[166] *Id* (emphasis added)

[167] *Id.* at 43.

[168] FEIS, Appendix E, Comment 15999 at 1.

[169] *Id.*

- "[t]he proposed action, in its current state, will cost lives Period."[171]

James E Arie, Barrington Fire Chief, commented that:

- "[o]ur *mission critical functions* will be severely impacted by increased freight train traffic that blocks access for our responding equipment ...:"[172]
- the proposed action would divert at least one-third of Good Shepherd's critical care patients to more distant hospitals, wasting from five to ten-and-a-half minutes in transit, and potentially costing lives;[173]
- the first four-to-six minutes following a cardiac arrest or other emergency medical situation is the "all-important" timeframe for administering prompt emergency medical treatment;[174] and
- lengthy EMS diversions to more distant hospitals would also create a "domino effect" of "much longer response times and more coverage areas not being protected by the closest emergency resources."[175]

In response in its FEIS and Decision, the Board simply repeated the mantra it established in its DEIS: "since the EJ&E line is .. an active rail line today, the affected emergency service providers' current dispatching process includes the possibility that a crossing could be blocked."[176] This response ignores the critical issue of emergency response time and does not respond to comments by Barrington and members of its community. Barrington commented on an earlier DEIS iteration of this "false comfort" by noting that the proposed action will bring a "substantial change in the volume and length of train operations," and that "Barrington is not

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[170] *Id*

[171] *Id* at 3

[172] Comments by James E. Arie at 3 (emphasis in original) Barrington could not discover the comments in FEIS Appendix E, but they were filed with SEA

[173] *Id.* at 4-5

[174] *Id.* at 2-3

[175] *Id* at 5-6

[176] Decision at 49

designed to handle the anticipated traffic volume from CN." As noted in comments, EMS providers in Barrington should not be expected to handle the proposed radical increase in train traffic that would block the four EJ&E Line highway/rail at-grade crossings and the Metra/UP rail crossing throughout Barrington simultaneously. The Board's repeated contention that Barrington EMS providers have experience in accounting for the occasional blockage of these at-grade crossings does not address comments from these very EMS providers that they cannot perform their jobs properly in the face of an enormous increase in train traffic.

The Board's failure to respond to Barrington's comments is reflected in the mitigation ordered by the Board In its Decision, the Board points to voluntary conditions VM-42 to 48 as responsive to Barrington's comments.[177] As Barrington has explained, VM-42 to 44 "have little impact on the degradation of emergency response services."[178] The Board never responded to Barrington's critique of these voluntary mitigation measures. Additionally, VM-45 to 48 have no impact on Barrington, as Applicants did not propose construction activities in Barrington. The Board also fails to respond to Barrington's comments through the Board's proposal of an additional mitigation measure The Board would require Applicants to install a video-monitoring (CCTV) system to aid "affected" EMS providers along the full EJ&E line in anticipating when an at-grade crossing may be blocked [179] The Board claims that this CCTV system "will provide emergency dispatchers with better and more timely information so that they can either take pre-planned alternative routes or dispatch services from alternative facilities...."[180] This general mitigation measure, however, does not respond to Barrington's

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[177] *Id* at 48-49

[178] Barrington's Comments on DEIS at 45

[179] *See* Decision at 48-49, 77 (Board's Final Mitigation Condition No 18)

[180] *Id* at 49

comments. A mere ability to *see* five Barrington crossings when they are blocked will not help to avoid the increased emergency response times and the loss of life that these blockages would cause.

II. Irreparable Harm Will Result If the Stay Is Not Granted

Barrington, towns around Barrington[181] and all other towns along the EJ&E Line, and the environment itself will be irreparably harmed if the Board does not stay its decision. The irreparable harms stem from both the Board's violations of NEPA and from the actual environmental impacts of the proposed action. The Board's numerous violations of NEPA themselves provide a valid basis for a stay pending proper environmental review, and the numerous irreparable harms to the environment under the proposed action compel its issuance.[182]

A. Violations Of NEPA Support A Presumption Of Injunctive Relief

As a threshold matter, the Board's violations of NEPA, as outlined above, are a form of irreparable harm that should be enjoined. "Ordinarily when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance."[183] One rationale for this is that "a project should not proceed, *with its often irreversible effect on the environment*, until the possible adverse consequences are known."[184] Another reason "is to preserve for the agency the widest freedom of choice when it reconsiders its action after coming into compliance

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[181] *See supra*, footnote 3

[182] Barrington and the surrounding area and towns are harmed by the proposed action

[183] *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977)

[184] *Id.* (emphasis added), *see also Callaway*, 382 F. Supp. at 624 (in light of NEPA violation due to inadequate EIS, Court could not permit project to proceed "until the agency properly determines the reasonable alternatives"), *Nat'l Wildlife Fed'n*, 440 F. Supp. at 1255-56 (there is authority that violation of a federal statute mandates an injunction, and at the very least a clear and substantial violation of the statute will lessen the need to balance other factors in determining injunctive relief)

with NEPA, e.g., after finding out about the possible adverse environmental effects of its action."[185] Although harm to the environment is a key concern, the central basis for enjoining the agency's noncompliance with NEPA is the "failure of decision-makers to take environmental factors into account in the way that NEPA mandates."[186]

B. Concrete Environmental Harms Provide Further Support For An Injunction

The existence of irreparable harm for the purposes of the stay standard is all the clearer when NEPA violations are coupled with concrete environmental harms, including aesthetic injury.[187] The environmental harms certain to result from the proposed action, when combined with the NEPA violations themselves, provide further evidence of the irreparable harms resulting in the absence of a stay. As the Supreme Court has explained, "[e]nvironmental injury, by its very nature, can seldom be adequately remedied by monetary damages and is often permanent or at least of long duration, i.e., irreparable."[188] Consequently, when environmental injury is "sufficiently likely ... the balance of harms will usually favor the issuance of an injunction to protect the environment."[189]

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[185] *Realty Income Trust*, 564 F 2d at 456

[186] *Jones v D C Redevelopment Land Agency*, 499 F 2d 502, 512 (D C Cir 1973), *see also Nat'l Wildlife Fed'n*, 440 F Supp at 1256 (irreparable harm prong was satisfied when construction of project at that time would "forever preclude proper consideration . of reasonable alternatives suggested by plaintiffs and others")

[187] *See, e g , Fund for Animals v. Norton*, 281 F Supp. 2d 209, 221-22 (D D C 2003) (collecting cases)

[188] *Amoco Prod Co* , 480 U S at 544, *see also Sierra Club v. U S Forest Serv.*, 843 F 2d 1190, 1195 (9th Cir 1988)

[189] *Amoco Prod Co* , 480 U S at 544

C. Significant And Irreparable Harms To Wildlife Will Occur Under The Proposed Action

The Board acknowledged in its decision that "the transaction may have adverse environmental effects that cannot be fully mitigated."[190] For example, rare and endangered species within the project area are certain to be harmed under the proposed action. Although the Board claims that "all issues" related to threatened or endangered species have been "adequately resolved,"[191] SEA determined that for species such as spotted turtles residing in the "[l]arge *marsh and wetland complexes ... [which] occur in numerous conservation and natural areas* within the Study Area" there may be a "mortality rate increase proportionate to the increase in traffic" on the EJ&E Line.[192] Specifically, "turtles and snakes ... *may experience a proportional increase in mortality based on the increase in traffic as these species may bask or nest on the railroad [right-of-way] or become trapped between rails.* Birds and mammals, as well as amphibians, reptiles, and invertebrates (including butterflies, dragonflies, beetles, and other slower and less responsive species) *would probably also have an increase in mortality proportionate to the increase in traffic.*"[193] In other words, spotted turtles and other creatures that cross the little-used EJ&E Line will be killed in much greater numbers when CN fills the line with freight trains. Similarly, SEA acknowledged that "wildlife, including migratory bird populations that forage within the Study Area, could experience increased pollution, noise, and vibration associated with the proposed action."[194]

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[190] Decision at 53.

[191] *Id*

[192] FEIS, at 3.3-9.

[193] *Id.* at 3.3-12 to 13 (emphasis added)

[194] *Id* at 3.3-10

In response, the Board's apparent belief is that the entirely foreseeable and increased deaths of numerous species of creatures, some threatened or endangered, along the EJ&E Line as a direct consequence of the proposed action can be mitigated through a few haphazard and toothless mitigation measures. The Board notes that "[a]pplicants have provided voluntary mitigation to avoid impacts" and that SEA has further recommended an additional six mitigation measures [195] However, a sampling of those measures demonstrates their vagueness and likely ineffectiveness

- Voluntary Mitigation Condition No. 104 requires, "where warranted," that CN shall "work with" relevant natural resource stakeholder groups and agencies to "support the creation or enhancement of migratory bird habitat away from those segments of the EJ&E Line on which Applicants project Transaction-related increases in rail traffic.[196]

- Voluntary Mitigation Condition No. 105 requires CN to "construct and maintain adequate passages" for turtles to cross portions of the EJ&E Line.[197]

- Voluntary Mitigation Condition No. 106 requires CN to "identify areas of suitable habitat of the Karner blue butterfly within Kirk Yard and in the vicinity of all planned Transaction-related construction of double track and new or improved connections" and "contact [The Nature Conservancy] about participation in the Safe Harbor Agreement for the Karner Blue Butterfly."[198]

The Board also instituted various additional mitigation measures mostly related to transaction-related construction, including limitations on when construction can be performed adjacent to bird nesting sites, or steps to be followed in the event a threatened or endangered species is encountered during construction.[199] Yet, the largely illusory nature of these mitigation

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[195] Decision at 52

[196] *Id* at 72

[197] *Id.*

[198] *Id*

[199] *Id* at 82-83 (Mitigation Conditions 49-60)

measures, which lack any concrete enforcement mechanisms or specific time periods for initiation or completion, belies the Board's claim that "all issues" related to threatened or endangered species have been "adequately" resolved. For example, even one of the rare mitigation measures containing any specificity, namely the requirement of the construction of turtle crossings, lacks detailed information as to the number and location of crossings, or the time period in which they must be commenced or fully operational.[200] Even assuming for the sake of argument that the Board's proposed mitigation measures would indeed adequately mitigate harms to threatened or endangered species (or others) when completed, there is no guarantee or even likelihood that those measures will be in place in time to mitigate the immediate impacts of increased rail traffic over the line. To the contrary, the certain and immediate deleterious impacts on native species of increased rail traffic clearly are irreparable harms.[201] Contrasted with the vague and largely speculative nature of the few mitigation measures imposed by the Board, the very real irreparable harms to the environment and creatures along the EJ&E Line together with NEPA violations themselves require the Board to stay its decision.

D. Additional Environmental Harms Will Occur Under The Proposed Action

The Board concedes that "the EIS makes it clear that communities along the EJ&E Line would experience increased train traffic, which could result in adverse impacts caused by increases in vehicle traffic delay, noise, air emissions, and risks to pedestrian and vehicular traffic at crossings."[202] In particular, SEA's flawed analysis nonetheless indicated that "air

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[200] *Id* at 72 (Mitigation Condition 105)

[201] *See, e g , Fund for Animals v Espy*, 814 F Supp 142, 151 (D D C 1993) (plaintiffs were threatened with irreparable harm sufficient to support injunction due to agency's NEPA violation as well as aesthetic injuries stemming from anticipated death of bison as part of research program, neither NEPA procedural injury nor injury to aesthetic interests could be compensated for with money damages), *Clark*, 27 F Supp 2d at 14 (same)

[202] Decision at 40

emissions, noise, vibration, and traffic delays from the increase in train traffic on the EJ&E line would affect residences located along the line."[203] Numerous parties, including Barrington, have filed extensive comments detailing the extent to which the proposed action will cause irreparable environmental harms to the environment and to communities along the EJ&E Line, such as increased rail and vehicular emissions, noise, and vibration, as well as the numerous ways in which the EIS improperly analyzed or addressed those harms.[204]

For example, SEA also acknowledged that the proposed action will increase CO2 emissions, with likely resulting impacts on the environment regionally, nationally, and globally through climate change, and locally through the "urban heat island" effect.[205] SEA also acknowledges that the proposed action will also result in environmental harms stemming from noise, vibrations, air emissions, and potentially even hazardous materials spills.[206] Moreover, CN's proposed plans to engage in double-tracking and other construction projects will also entail environmental impacts.[207] These numerous and foreseeable impacts, which will derive directly and immediately from the effective date of the Board's decision absent a stay, are the very sort of environmental injuries that the Supreme Court indicated "by [their] very nature, can seldom be adequately remedied by monetary damages and [are] often permanent or at least of long duration, *i.e.*, irreparable."[208]

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[203] *Id.* at 48

[204] *See, e.g.*, Barrington's Comments on DEIS, at 5, 56-70

[205] FEIS, at 2-103

[206] *See, e.g., id.* at 2-1, 2-2

[207] *See, e.g., id.* at 2-1

[208] *Amoco Prod. Co.*, 480 U.S. at 544, *see also U.S. Forest Serv.*, 843 F.2d at 1195

As discussed above, Barrington itself will also suffer numerous, particularized irreparable harms. For example, the Board's failure to properly identify and analyze noise impacts with an appropriate Ldn threshold and contour inherently skews the Board's assessment, and likely subjects Barrington to additional environmental harms from noise increases under the proposed action. Similarly, Board's failure to address the reasonable foreseeability of additional double-tracking along the EJ&E Line, with all the environmental impacts related to construction activities and additional traffic growth, will continue to saddle Barrington with ongoing and irreparable harms long after the Proposed action has faded from the Board's consciousness.

Moreover, in addition to numerous environmental harms Barrington will also suffer irreparable socioeconomic harms due to the impact of the proposed action on the village itself. For example, under the proposed action Barrington will suffer significant harms tied to the impacts on emergency response and delays harmful to Barrington's first responders and public services.[209] Other significant and foreseeable socioeconomic harms to Barrington include damage to the village's local economy and tax base.[210] In short, the irreparable environmental impacts at the regional level as well as specific to Barrington will be paralleled by a cascading series of socioeconomic harms that will damage everything from Barrington's emergency services to its local businesses and quality of life. Barrington clearly meets, and indeed far exceeds, the threshold for irreparable harm

III. Other Parties Will Not Be Substantially Harmed

CN likely will assert that it would be harmed by a stay. However, CN would not be substantially harmed, because a stay would not trigger a termination right of the Elgin, Joliet &

[209] *See, e g* , Barrington's Comments on DEIS, at 41-43

[210] *Id.* at 48.

Eastern Railway Company. None of the arguable ambiguities in Sections 2.3 or 9.1 of the SPA related to a stay apply to alter the rights of the parties (whatever they are) after December 31, 2008. In addition, any monetary injury to CN arising from a stay would be modest given the fact that CN is an extremely successful and profitable Class I railroad. Finally, CN will continue to operate its regular trains along all five lines into Chicago *and* on its trackage rights during the pendency of judicial review and the subsequent proper review of the proposed transaction under NEPA.

The Board will not be substantially harmed by the issuance of a stay. The Board is not the proponent of the project, and will not have any of its interests harmed by a stay. Since the Board has relied upon, and would continue to rely upon, a third-party contractor funded by CN, the Board is also not at risk for any additional costs that might be incurred as part of full compliance with NEPA.

Nor will other interested parties to the proceeding or the public be substantially harmed by the stay Although some individuals and third parties might claim an interest in alleged benefits flowing from the slight reduction in Chicago rail traffic, retention of the *status quo* pending appeal will not substantially harm third parties because any alleged benefits would only be postponed for *during* the pendency of judicial review and the subsequent proper review of the proposed transaction under NEPA.

IV. Issuance Of The Stay Is Consistent With The Public Interest

Staying the Decision pending full compliance with NEPA is clearly in the public interest of upholding environmental laws and in protecting the environment. There is a "strong public interest in meticulous compliance with the law by public officials."[211] The public

[211] *Espy*, 814 F Supp at 152 (further noting that the Constitution provides that executive branch appointees should "take Care that the Laws be faithfully executed "), *see also Norton*, 281 F Supp 2d at 237 (collecting cases)

"unquestionably has a substantial stake in enforcement of NEPA and other similar laws and in the preservation of the natural environment."[212] Failure to comply with NEPA is therefore a frustration of the will of Congress, and "the public interest would be served by having [the Board] address the public's expressed environmental concerns, as encompassed by NEPA, by complying with NEPA's requirements."[213] Thus the public interest will be served by the issuance of a stay pending the Board's full compliance with NEPA.

In addition, a stay will merely maintain the *status quo* pending judicial review and full NEPA compliance, ensuring that the risks of harm to the environment under the proposed action have been identified and analyzed.[214] Absent a stay, CN will immediately proceed to engage in both increased rail traffic movements as well as numerous and varied construction projects related to the proposed action. The new environmental impacts of those activities (including even alleged mitigation activities) will be irreparable and contrary to the public interest. Despite the significant flaws in the Board's FEIS, it is clear that communities and the environment itself along the EJ&E Line will suffer significant environmental harms absent a stay.

CONCLUSION

The effective date of the Board's Decision No. 16 in the above-captioned proceeding should be stayed pending judicial review and completion of the NEPA process. As discussed above, Barrington exceeds the standards for a Board-ordered stay, and respectfully requests that a stay be so granted.

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[212] *Nat'l Wildlife Fed'n*, 440 F. Supp. at 1256.

[213] *Clark*, 27 F. Supp. 2d at 15.

[214] *See Sierra Club v. Watkins*, 808 F. Supp. 852, 875 (D.D.C. 1991) (environmental harms are rarely remediable by reliefs other than injunction, and public interest is served by "the simple enforcement of NEPA").

Respectfully submitted,

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ATTORNEYS FOR
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Dated: January 5, 2009

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2009, I caused the foregoing **Village of Barrington's Petition for Stay** to be served via first class mail, postage prepaid, or by a more expeditious method of delivery on all parties of record and on the following:

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